Supreme Court, U.S.
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In The

Supreme Court of the United States

RONALD HAMILTON,

Petitioner,

v.

J. D. COLLETT, and JEFFREY RAMIREZ,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DOUGLAS R. LARSON
State Bar No. 11958000
410 West Main, Suite 101
Mesquite, Texas 75149
(972) 329-0160

Attorney for Petitioner
Ronald Hamilton

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Is Police perjury concerning a material allegation of criminal conduct that was made in a probable cause presentation protected by the qualified immunity doctrine?

2. Does perjury concerning a material matter given to a Grand Jury to obtain an indictment violate the Constitution?

3. If the answer to preceding inquiry is yes, does perjury concerning a material criminal element give rise to a claim for wrongful or malicious prosecution that is actionable pursuant to 42 U.S.C. §1983 and/or the Fourth Amendment to the Constitution?

4. Did Congress intend in passing 42 U.S.C §1988(a) to direct a court presented with 42 U.S.C. §1983 suit involving a claim for malicious or wrongful prosecution to fashion an appropriate remedy?

LIST OF INTERESTED PARTIES

1.	Ronald A. Hamilton	Petitioner
2.	Douglas R. Larson	Counsel for Petitioner
3.	J.D. Collett	Respondent
4.	Jeffrey Ramirez	Respondent
5.	Jason G. Schuette	Trial and Appellate counsel for J.D. Collett
6.	Frank D. Able	Trial Counsel for Jeffrey Ramirez
7.	Sushma Soni	Appellate Counsel for Jeffrey Ramirez

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PETITION FOR WRIT OF CERTIORARI

Petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is not a reported decision. A copy of the court's opinion is in the Appendix at 1a. An application for rehearing was sought but was denied on January 12, 2004. A copy is reprinted in the Appendix at 27a. The decision of the District Court is not published but a copy is reprinted in the Appendix at 7a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 2003. Petitioner timely sought a rehearing of the decision but this application was denied on January 15, 2004. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV

The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FEDERAL STATUTES INVOLVED

42 U.S.C. §1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1988. Proceedings in Vindication of Civil Rights.

(a) Applicability of statutory and common law.

The jurisdiction in civil and criminal matters conferred on the District Courts by the provisions of Titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common

law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (Title 24, at the time of the passage of this provision, included §1983.)

STATEMENT OF THE CASE

The Petitioner is Ronald Hamilton. This litigation concerns a combination 42 U.S.C. §1983 and a claim based on the Fourth Amendment [*Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971)] claim for false arrest and malicious prosecution brought against Respondents. The Respondents are Dallas Police Officer J. D. Collett and F.B.I. Agent Jeffrey Ramirez. These individuals are primarily responsible for initiating and seeking Petitioner's arrest and prosecution. Hamilton was initially arrested on June 18, 1993 as a result of a joint state and federal investigation conducted by Ramirez and Collett for an alleged violation of Federal and Texas gambling laws. Hamilton faced first State and then Federal charges of illegal gambling. The State charge against Hamilton was dismissed in favor of a Federal prosecution in January 1995. After a jury trial, Hamilton was partially acquitted of the Federal charges on April 22, 1997. The remaining jury findings were appealed and the United States Court of Appeals for the Fifth Circuit directed a complete acquittal of the Federal charges on August 24, 1998. *See, United States v.*

Truesdale, et al., 152 F.3d 443 (5th Cir. 1998). Hamilton's acquittal gave rise to this litigation.

Both of Hamilton's arrests and prosecutions resulted from contentions by Ramirez and Collett that Hamilton and his criminal co-defendants were operating an illegal bookmaking business and that they had accepted and/or received illegal bookmaking bets in Texas. There was no evidence that any illegal Texas bet was ever received by Hamilton or anyone else associated with him but that did not deter either Collett or Ramirez from falsely swearing to Magistrates and Grand Juries that illegal Texas bets had been received in Texas by Hamilton and some of those associated with him.

Hamilton's alleged criminal role in the State and Federal arrests and prosecutions stemmed from his association with primarily two individuals, James Truesdale and Richard Jones. Before the incidents that form the factual background of this litigation, Petitioner Hamilton and his close friend, James Truesdale, each operated a "tout" service. In the operation of their respective "tout" services, Hamilton and Truesdale would each make predictions as to the outcome of sporting events and place their respective predictions on audio tape which was then made accessible to customers by telephone. On behalf of Hamilton and Truesdale, the telephone company collected a fee each time a "customer" listened to their recorded sports related predictions. In 1991, a mutual friend introduced Hamilton and Truesdale to Richard Jones. At the time of the introduction, Jones operated an offshore bookmaking or gambling operation situated at various times in the Dominican Republic and/or Jamaica. Jones

needed customers for his gambling operation and discussions ensued between Jones, Hamilton and Truesdale. (R. Vol. 3, pp. 492-493).

After consulting with lawyers and assuring themselves that Jones' operation was lawful, a formal agreement was negotiated with Jones which provided for the payment of referral fees by Jones to Hamilton and Truesdale for their advertisement of Jones' "book". In addition to their tout services, both Hamilton and Truesdale operated telephone scoreboard services in 16 cities across the United States. Anyone familiar with the service could call the scoreboards and receive accurate, up-to-date information on the scores of sporting events occurring across the country. This telephone scoreboard contained advertising spots wherein Hamilton and Truesdale each advertised their "tout" services. After entering into the referral fee agreement with Jones, they additionally advertised Jones' offshore gambling operation known as World Sportsbook (or Spectrum). To protect their referrals to Jones' book from dishonesty, Hamilton and Truesdale bonded their referrals. (R. Vol. 3, p. 492.)

To identify their referrals, Hamilton and Truesdale advertised a different toll-free telephone number than Jones' established toll-free telephone number. All of these toll-free numbers terminated at Jones' offshore "book". The different number permitted the persons referred to Jones by Hamilton and Truesdale to be easily identified as a Hamilton/Truesdale referral. To facilitate their referrals, both Hamilton and Truesdale established a telephone toll-free information number that terminated in their homes.

This line was used to provide information to any person who wished to make use of Jones' offshore book. (R. Vol. 3, pp.492-494.)

Hamilton, Truesdale and Jones very carefully avoided violating any illegal gambling statute. Because all of the bets were received offshore in either Jamaica or the Dominican Republic where "bookmaking" operations were lawful, none of the agreements between Jones' bookmaking operation and the Hamilton/Truesdale referral business ran afoul of the law. Because they believed their activities to be legal, they made no attempt to conceal their activities. All three of them, Hamilton, Truesdale and Jones, openly advertised their respective businesses. In spite of their care, in 1993, Hamilton (as well as Truesdale and Jones) were arrested and charged with a Texas gambling offense (bookmaking). Ramirez and Collett were primarily responsible for these arrests and the ensuing prosecutions. The first charge resulted from testimony provided by Collett to a Texas Grand Jury. This resulted in an indictment from the Dallas County Grand Jury on June 23, 1993. The Dallas County indictment contended that Hamilton, on the 5th day of February A.D., 1993 acted as a bookmaker and accepted illegal bets in Dallas County, Texas. To be found guilty of this charge, the Dallas County Prosecutor had to present evidence to the trier of fact that Hamilton had received bets in Texas. There was no truthful evidence of this but Collett provided perjured testimony to support this necessary element of the crime of bookmaking to the Grand Jury.

This indictment was dismissed by the Dallas County District Attorney in January 1995. The dismissal was purportedly done to permit a Federal prosecution to occur. (R. Vol. 3, pp. 463, 492-495.) Petitioner believes that the

Dallas County District Attorney actually consented to the dismissal because he realized that he could not prove that Hamilton had accepted an illegal bet in Texas.

Some months later in 1995, a second gambling indictment against Hamilton was brought to the attention of a Federal Court. This Federal indictment alleged that Hamilton, his friend James Truesdale, and the person to whom they made referrals, Richard Jones, were involved in conspiracy to violate both the State and Federal gambling laws. Title 18 U.S.C. §1995 was the statutory basis for the Federal indictment. This statute prohibits "conduct[ing], financ[ing], manag[ing], supervis[ing], direct[ing], or own[ing] all or part of an illegal gambling business." 18 U.S.C. §1995(a). An illegal gambling business is defined as one that "is in violation of the law of the State of political subdivision in which it is conducted." 18 U.S.C. §1955(b)(1). As the Federal statute is written, one cannot violate the Federal statute, 18 U.S.C. §1955, unless there is also evidence that the state's (Texas) gambling laws were violated. (R. Vol. 3, pp. 490-501.) To be found guilty of Texas gambling statutes involving bookmaking, the applicable Texas statutes require the receipt of one or more bets within the borders of Texas. *See* Texas Penal Code Sections Art 47.01 and Art. 47.03.

After a Federal trial and a subsequent appeal, Hamilton, Truesdale and Jones were acquitted of all charges either by the jury and as a result of an order of acquittal directed by the United States Court of Appeals for the Fifth Circuit, in *United States v. Truesdale, et al., supra*. The Court of Appeals determined there was no evidence that a bet was received in Texas by Hamilton or any of the other Truesdale defendants and this required a directed order of an acquittal for Hamilton and his associates.

After this acquittal, Hamilton brought this litigation against the two respondents. Hamilton contended that his arrest and prosecution stemmed from a false claim that illegal bets had been received in Hamilton's Texas home. The Court of Appeals' decision for which Petitioner seeks this court's review resulted from the respondent's (Collett and Ramirez) interlocutory appeal of the District Court's summary judgment determination that FBI Agent Ramirez and Dallas Police Officer Collett were not entitled to qualified immunity protection. The respondents challenged the District Court's decision that had said a trial was necessary before their claim to immunity could be resolved. The Court of Appeals reversed the District Court's finding that the respondents were not entitled to immunity and also held that Hamilton's malicious prosecution claim against both respondents was not actionable. *See* Court of Appeals' decision, Appendix pages 1a-6a.

The District Court had determined that evidence existed that both Dallas Police Officer Collett and FBI Agent Ramirez had given material evidence in the form of perjured Grand Jury testimony and/or they used perjured statements in probable cause presentations to achieve both Hamilton's arrest and his prosecution. To support Hamilton's arrest and prosecution, both respondents falsely contended that on June 18, 1993, while a Federal search warrant was being executed in Hamilton's home, an FBI agent (Molina) answered a telephone and that during this telephone conversation, Molina accepted an illegal bet from a caller. Agent Molina categorically denied that this occurred. In his probable cause presentation to the state District Court, Collett said he made several calls to place bets to Hamilton's home but Collett belatedly admitted in his deposition that he did not know where the

persons to whom he made the calls to place bets were actually located. This admission contradicted previous sworn statements that Collett had made to a Texas court and Grand Jury that bets had been accepted in Hamilton's home. Collett's state probable cause presentation also contradicted his testimony in a Motion to Suppress hearing that took place in the "Truesdale" criminal proceeding. In this hearing, Collett admitted that all of the calls he made to place bets had been accepted by Jones' book offshore. *See* Magistrate Judge's opinion adopted by the District Court, Appendix pages 16a-19a.

REASONS FOR GRANTING CERTIORARI

I. THIS COURT SHOULD DETERMINE THE CIRCUMSTANCES WHEN A POLICE OFFICER WHO COMMITS PERJURY IN A PROBABLE CAUSE PRESENTATION IS ENTITLED TO QUALIFIED IMMUNITY.

The Petitioner believes that the unpublished Court of Appeals' decision in this cause sanctions police perjury concerning the only element that could have established probable cause for both Hamilton's arrest and prosecution, i.e., that Hamilton accepted or received bets in Texas. The petitioner believes that the Court of Appeals' decision in this cause violates this Court's decisions in *Malley v. Briggs*, 475 U.S. 335 (1986) and *Franks v. Delaware*, 438 U.S. 156 (1986). In *Franks v. Delaware*, *supra*, this Court said that false information should be excised from a probable cause affidavit and only then, if the remaining information established probable cause, would the resulting arrest or search be constitutionally valid. The Court of Appeals claimed to follow this procedure and said that if

the perjured elements were omitted from the probable cause presentations that this would thereby destroy Hamilton's claim that he was arrested in violation of the Fourth Amendment. The Court of Appeals said that, if the perjured testimony that Hamilton had received bets in his Dallas home, was excluded from the probable cause presentations that the following considerations would nevertheless establish "probable cause" for Hamilton's arrest: (1) that Hamilton was identified as an advertising agent for World Sportsbook (WSB) in a letter to potential bettors; (2) that Hamilton established a bonding system for the bettors he referred to WSB; (3) that Hamilton possessed a tally sheet of bets placed with WSB; (4) that Hamilton would pick up bettors' Western Union transfers and deposit them in various Dallas bank accounts; and (5) that payoffs to winners were made from Dallas-area bank accounts belonging to Hamilton. *See* Court of Appeals opinion, Appendix at page 5a. Unexplained by the Court of Appeals is how any of these factors could possibly be indications of criminal activity when the evidence shows that both Respondents knew that no bet had been received in Texas and when both respondents knew that all of the bets were received by Jones' book operating legally off-shore. This factor renders all of the foregoing considerations that purportedly support Hamilton's arrest completely meaningless because without evidence of illegal bets received in Texas there was no evidence of illegal bookmaking. Additionally, the Court of Appeals ignored that Hamilton had presented summary judgment evidence that he did not possess "tally sheets."

Importantly, the Court of Appeals failed to recognize that most of the aforementioned considerations were not actually a part of either Ramirez or Collett's probable

cause presentations, but instead were matters that were presented as evidence at Hamilton's criminal trial. These same considerations were found by the Court of Appeals in *United States v. Truesdale, et al., supra*, not to be evidence of criminal conduct, *see United States v. Truesdale, et al., supra*, at 448-449.

The Court of Appeals previous determination in *United States v. Truesdale, et al.,* that offshore gambling involving Texas residents was not criminal conduct, coupled with the Court of Appeals observations that the "Truesdale" defendants were operating openly and not acting like criminals, does not support the later Court of Appeals claim in this case that absent the false testimony concerning the receipt of Texas bets that there was "probable cause" to believe that a violation of Texas law had occurred. *See, United States v. Truesdale, et al., supra*, at 448. Two members of the panel that decided *United States v. Truesdale, et al.,* also decided this case, so the Court of Appeals Panel cannot be forgiven for the failure not to have a complete understanding of both cases. Based on both Court of Appeals' decisions, it appears to the Petitioner that the Court of Appeals believes that he is only entitled to a partial vindication of his constitutional rights, even if the circumstances justify a complete vindication.

This court should examine the record in this cause and use its supervisory powers to correct the failure of the Court of Appeals to properly evaluate the probable cause criteria that remained after the perjured claims that illegal bets were received or accepted in Hamilton's Texas home were excised. The petitioner contends that once the perjured claim of illegal bets being received in Texas is excised from both of the respondent's probable cause arrest warrant presentations that it is not possible to

contend that probable cause authorizing the petitioner's arrest remained. This court should likewise hold that testimony concerning a material element of criminal conduct should never entitle a police official to qualified immunity protection.

II. THIS COURT SHOULD RECONCILE THE LAW IN CIRCUITS AND SETTLE WHETHER A §1983 CLAIM OF WRONGFUL OR MALICIOUS PROSECUTION CAN BE BROUGHT.

The petitioner objects to the Court of Appeals summary disposal of the plaintiff's malicious prosecution claim. According to the Court of Appeals, Hamilton's claim of malicious prosecution was governed by a recent *en banc* decision made by the Fifth Circuit, *Castellano v. Fragosa*, 352 F.3d 939 (5th Cir. 2003) *en banc*. (The Castellano decision predated the Court of Appeals' decision in this case by a mere six days.) The Castellano decision overruled almost 20 years of Fifth Circuit jurisprudence which had formerly held that a malicious prosecution claim was actionable under §1983.

According to the Court of Appeals, [Hamilton's] "a claim of malicious prosecution standing alone does not violate the Constitution." *See* Court of Appeals' opinion, Appendix pages 3a-4a. The clear implication of the Court of Appeals' decision is that perjured testimony given to a Grand Jury considering an indictment concerning a material element of a crime would not violate the Fourth Amendment. This finding is not intellectually consistent with the Supreme Court's holdings in several cases. The Supreme Court has held for quite some time that the Constitution protects against deliberate deceptions of a court and/or a jury. *Mooney v. Holoban*, 294 U.S. 103

(1935); *Pyle v. State of Kansas, et al.*, 317 U.S. 213 (1942); *United States v. Agurs*, 427 U.S. 97 (1976). Importantly, this court has said the Fourth Amendment and dishonesty are not compatible. *Franks v. Delaware*, *supra*. If perjury violates the Constitution, then it would seem to logically follow that the Constitution and/or §1983 would authorize a remedy.

The Court of Appeal's decision in this case holding that perjured testimony leading to arrest and prosecution is not actionable places the Court of Appeals for the Fifth Circuit at odds with most of the other Circuits. The First, Second, Third, Ninth, and Tenth Circuits recognize a §1983 claim of malicious prosecution as long as there is proof of a constitutional violation. *See, Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001); *Britton v. Maloney*, 196 F.3d 24 (1st Cir. 1999); *Singer v. Fulton County*, 63 F.3d 110 (2nd Cir. 1995); *Murphy v. Lynn*, 118 F.3d 938 (2nd Cir. 1997), *Donoho v. Gavin*, 280 F.3d 371 (3rd Cir. 2002); *Gallo v. City of Philadelphia*, 161 F.3d 217 (3rd Cir. 1998); *Poppel v. City of San Diego*, 149 F.3d 951 (9th Cir. 1998); *Taylor v. Meacham*, 82 F.3d 1556 (10th Cir. 1996). The Fourth, Seventh and Eleventh Circuits view malicious prosecution as unenforceable under §1983. However, these Circuits do selectively use common law elements of a malicious prosecution claim as a method of enforcing a §1983 claim of a constitutional violation akin to a malicious prosecution claim. *Lambert v. Williams*, 223 F.3d 257 (4th Cir. 2000); *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001); *Wood v. Kesler*, 323 F.3d 872 (11th Cir. 2003); *Whiting v. Traylor*, 85 F.3d 581 (11th Cir. 1996). The Sixth and Eighth Circuits recognition of a §1983 malicious prosecution claim is not clear. *See, Thacker v. City of Columbus*, 328 F.3d 244 (6th Cir. 2003); *Pace v. City of Des Moines*,

201 F.3d 1050 (8th Cir. 2000). The Court of Appeals for the Ninth Circuit recognizes a species of malicious prosecution in a "Bivens" claim. *See, Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), *cert denied*, 118 S.Ct. 1051 (1998). Due to the fact Hamilton's claim against F.B.I. Agent Ramirez for malicious prosecution was rejected by the Court of Appeals for the Fifth Circuit in this cause, it appears that the Fifth Circuit does not believe the federal common law and/or the Fourth Amendment authorizes a claim for wrongful prosecution as well.

Hamilton's potential claim of a species of malicious prosecution is not burdened by the trial witness immunity doctrine recognized in *Briscoe v. La Hue*, 460 U.S. 325 (1983). Other than in a pre-trial motion to suppress hearing, Collett did not testify at Hamilton's Federal criminal trial. Ramirez testified in Hamilton's federal criminal trial, but he pointedly avoided making a direct claim that Hamilton or any of the other criminal defendants had actually received a bet in Texas. In his trial testimony, Ramirez did no more than allude to a telephone call involving the subject of gambling that occurred in Hamilton's home on June 18, 1993. This occurred when an F.B.I. Agent (Molina) who, while participating in a search of Hamilton's home, answered Hamilton's telephone and conversed with a person seeking information. At the criminal trial, Agent Molina testified that no bet was accepted by him. Ramirez's perjured Federal Grand Jury testimony that a bet was accepted by Molina in the Plaintiff's home by Molina was most probably not repeated in the (Hamilton's) criminal trial because trial testimony, unlike Grand Jury testimony, would have subjected Ramirez to cross-examination and this would have potentially exposed his perjury. Because of these considerations,

Hamilton's claim of malicious prosecution against the respondents is not affected by the trial witness immunity doctrine recognized in *Briscoe v. La Hue*, *supra*. The Supreme Court has held that the protections for a trial witness, does not apply to a complaining witness who wrongfully brings about an arrest. *Malley v. Briggs*, *supra* at 341. By implication, it would appear that Grand Jury testimony on the part of a complaining witness should likewise not receive the benefit of the trial witness immunity doctrine.

The plain language of 42 U.S.C. §1988(a) indicates that Congress intended for the Federal Courts to be creative in effecting the aims of 42 U.S.C. §1983. This court has considered this on at least two occasions. *See, Moor v. County of Alameda*, 411 U.S. 963 (1973); *Sullivan v. Little Hunting Par, Inc.*, 396 U.S. 229 (1969).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS R. LARSON
State Bar No. 11958000
410 W. Main Street, Suite 101
Mesquite, Texas 75149
(972) 329-0160

Attorney for Petitioner
Ronald Hamilton

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10954

RONALD A. HAMILTON,

Plaintiff-Appellee,

versus

J.D. COLLETT; ET AL,

Defendants,

J.D. COLLETT; JEFFREY RAMIREZ,

Defendants-Appellants.

Appeals from the United States District Court
For the Northern District of Texas – Dallas Division
Civil Action No. 00-1469

(Filed Dec. 11, 2003)

Before GARWOOD, JONES, and STEWART, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Plaintiff-appellee Ronald Hamilton sued Dallas police officer J.D. Collett and FBI agent Jeffrey Ramirez under

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

42 U.S.C. § 1983 and its constitutional counterpart, *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971), for false arrest and malicious prosecution in violation of the Fourth and Fourteenth Amendments to the United States Constitution. Defendants filed a motion for summary judgment arguing, inter alia, that Hamilton could not prove the elements of his civil rights claim or overcome the defendants' qualified immunity defense. The district court denied the motion, and the defendants now appeal. Because we find that the malicious prosecution claim must be dismissed and that both defendants are entitled to qualified immunity for the false arrest claim, we reverse the district court and enter summary judgment on the defendants' behalf.

I. BACKGROUND

The facts underlying this case have been extensively reported by this court in *United States v. Truesdale,* 152 F.3d 443 (5th Cir. 1998), and will not be repeated here. Briefly, Hamilton was arrested and prosecuted on various conspiracy, money laundering, travel in aid of racketeering, and gambling counts related to his involvement with World Sportsbook ("WSB"), an international sports wagering operation. After a jury convicted Hamilton on multiple counts, a panel of this court reversed his conviction on a finding of insufficient evidence.

Hamilton then initiated the instant suit, asserting that the defendants made a number of false statements that led to his arrest and prosecution. Specifically, Hamilton complains that Agent Ramirez falsely testified before the federal grand jury that an illegal bet was placed with another FBI agent during a search of Hamilton's residence.

Likewise, Hamilton contends that Collett falsely swore in an affidavit before a Dallas County grand jury that bets were taken at Hamilton's home during the search. Hamilton argues that because no bets were actually taken during the search of his residence, probable cause is destroyed and the defendants violated his clearly established constitutional rights.

II. JURISDICTION AND STANDARD OF REVIEW

Hamilton asserts that this court lacks jurisdiction over this interlocutory appeal because the district court concluded that genuine issues of material fact exist. However, this court has jurisdiction to consider the purely legal question of whether, taking the plaintiff's version of the facts as true, the plaintiff has alleged a violation of clearly established law. *Roe v. Tex. Dep't of Protective & Regulatory Serv.,* 299 F.3d 395, 400 (5th Cir. 2002).

This court reviews the district court's denial of a summary judgment motion based on a claim of qualified immunity de novo. *Hatfield v. Scott,* 306 F.3d 223, 226 (5th Cir. 2002). Determining probable cause is a mixed question of law and fact: "[a]lthough factual findings are reviewed for clear error, we review the legal conclusions reached by the district court de novo." *Gordy v. Burns,* 294 F.3d 722, 729 (5th Cir. 2002).

III. DISCUSSION

A. Malicious Prosecution

Hamilton argues that the defendants' false statements caused him to be maliciously prosecuted in violation of the United States Constitution. However, this court has

recently held that a claim of malicious prosecution standing alone does not violate the United States Constitution. *Castellano v. Fragozo,* No. 00-50591, 2003 WL 22881590, at *1 (5th Cir. Dec. 5, 2003) (en banc). Thus, Hamilton cannot establish that the defendants violated his constitutional rights in this regard and the claim must be dismissed.

B. False Arrest

The key inquiry in the false arrest context is whether the officers are entitled to qualified immunity. Courts engage in a two-step analysis when determining if public officials are entitled to qualified immunity. First, we must determine whether the facts, as the plaintiff alleges, establish that the officer violated a constitutional right. *Price v. Roark,* 256 F.3d 364, 369 (5th Cir. 2001). If no constitutional right has been violated, the inquiry ends and the defendants are entitled to qualified immunity. *Id.* However, if the plaintiff has alleged a constitutional violation, the court must next determine whether the right was clearly established at the time of the alleged violation. *Id.*

A claim of unconstitutional false arrest requires a showing of no probable cause. *Brown v. Lyford,* 243 F.3d 185, 189 (5th Cir. 2001). The question presented here is whether, setting aside the allegedly false testimony by the defendants, probable cause existed to believe that Hamilton committed an offense. *See Freeman v. County of Bexar,* 210 F.3d 550, 553 (5th Cir. 2000). Stated another way, the question is whether the allegedly false testimony was necessary to the Magistrate Judge's determination of probable case. *See, e.g., Franks v. Delaware,* 438 U.S. 154,

171-72 (1978). "[T]he probable cause analysis only requires that we find a basis for an officer to believe to a 'fair probability' that a violation occurred." *Piazza v. Mayne*, 217 F.3d 239, 246 (5th Cir. 2000).

The evidence known to both Collett and Ramirez, excluding that evidence which Hamilton alleges to be false, established probable cause as a matter of law. The defendants were aware of, inter alia, the following pertinent facts: (1) Hamilton was identified as an advertising agent for WSB in a letter to potential bettors; (2) Hamilton established a bonding system for the bettors he referred to WSB; (3) Hamilton possessed a tally sheet of bets placed with WSB; (4) Hamilton would pick up bettors' Western Union transfers and deposit them in various Dallas bank accounts; and (5) payoffs to winners were made from Dallas-area bank accounts belonging to Hamilton. A reasonable basis existed for Collett and Ramirez to find a fair probability that a violation of Texas gambling laws occurred.[1]

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[1] The Texas gambling law to which both officers referred in their testimony is Section 47.03(a)(2) of the Texas Penal Code, which provides that "[a] person commits an offense if he intentionally or knowingly . . . engages in bookmaking." Bookmaking is further defined as "a scheme by three or more persons to receive, record, or forward bets or offers to bet." TEX. PEN. CODE ANN. § 47.01(2)(C) (Vernon 2003). Collett prepared an affidavit in support of the original state arrest warrant for Hamilton for engaging in organized crime in violation of Section 71.02 of the Texas Penal Code. A person violates that section by committing or conspiring to commit a gambling offense. TEX. PEN. CODE ANN. § 71.02(a)(2) (Vernon Supp. 2004). Ramirez testified before the federal grand jury that Hamilton was involved in an illegal bookmaking operation in violation of Texas law, which in turn violated 18 U.S.C. § 1955. The undisputed facts known to both defendants, including that

(Continued on following page)

It is also important to note that in ruling on Hamilton's motion to suppress, a district court judge found that probable cause existed to believe Hamilton was involved in illegal gambling. Specifically, the district court judge concluded that, based on the letter identifying Hamilton as WSB's advertising agent, his "link to WSB's illegal gambling operation is clear." Because probable cause existed, even absent the allegedly false statements, the defendants did not violate Hamilton's constitutional rights and are therefore entitled to qualified immunity.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is **REVERSED**, and the case is **REMANDED** for entry of judgment in favor of the defendants.

REVERSED and **REMANDED**.

Hamilton handled bettors' transfers and payoffs, was WSB's advertising agent, and possessed a sheet listing various bets, establishes probable cause to believe that a violation of Texas law had occurred.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD A. HAMILTON	§	
Plaintiff,	§	
	§	
VS.	§	NO. 3-00-CV-1469-R
	§	
J.D. COLLETT, ET AL.	§	
	§	
Defendants.	§	

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Jul. 22, 2002)

Defendants J.D. Collett and Jeffrey Ramirez have filed separate motions for summary judgment in this civil rights case.[1] For the reasons stated herein, both motions should be denied.

I.

This is a civil rights action arising out of the indictment, arrest, and trial of Ronald A. Hamilton on federal gambling charges. The facts of the case are set forth at length in *United States v. Truesdale,* 152 F.3d 443 (5th Cir. 1998). Succinctly stated, Hamilton was associated with Richard Jones, the head of an international sports wagering

[1] Defendant Roberto Molina also filed a motion for summary judgment. However, at oral argument, counsel for plaintiff agreed to dismiss all claims against Molina with prejudice. This moots consideration of Molina's summary judgment motion.

service variously known as Spectrum or World Sportsbook. These companies maintained offshore offices in the Dominican Republic and Jamaica to avoid potential criminal liability under domestic gambling laws. Customers placed bets at these foreign locations through toll-free numbers set up by Jones. Although some of the numbers terminated at locations in the Dallas area, these "information only" lines were not used to accept bets.

Before a customer could place a bet, he would be required to open an account with World Sportsbook by wiring money via Western Union or sending it by Federal Express. Hamilton and James Truesdale, another Jones associate, would pick up wire transfers from the Western Union office and deposit the money in various bank accounts in the Dallas-Fort Worth area. Payoffs to winners were made from accounts at local banks belonging to Hamilton and Truesdale. In addition to their direct involvement with Jones, Hamilton and Truesdale maintained their own sports information telephone lines that promoted World Sportsbook by advertising the wagering service and giving out information-only toll-free numbers. In exchange for this advertisement, Hamilton and Truesdale received 50% of the profits derived from customers brought in to World Sportsbook as a result of the ads.

On June 18, 1993, a joint task force consisting of federal and state law enforcement agents moved to shut down the World Sportsbook operation in Dallas. J.D. Collett, a Dallas police officer, and Jeffery Ramirez, an FBI agent, were members of this task force. As part of their investigation, agents obtained a warrant to search Hamilton's residence. The warrant was issued, in part, based on representations made by Collett in a sworn affidavit that Hamilton had an elaborate telephone system in his Dallas

home consisting of 30 or more lines that were used to accept illegal bets. While executing this warrant, a call came in from a person asking for the line on a sporting event. FBI Agent Roberto Molina answered the call and offered to take a bet. However, no bet was placed. Agents also seized a tally sheet of bets placed with World Sportsbook and a list of bettors from Hamilton's residence.

On or about June 23, 1993, Collett and Ramirez testified before a Dallas County Grand Jury that Hamilton was guilty of operating an illegal bookmaking business. In particular, Collett told the grand jury that it was a crime under Texas law to place bets with World Sportsbook by telephone in Jamaica and the Dominican Republic, countries where gambling was legal. Based on this testimony, Hamilton was indicted on state gambling charges. However, the indictment was dismissed after the U.S. Attorney decided to pursue federal charges against Hamilton, Truesdale, and Jones. Collett and Ramirez testified to the same facts before a federal grand jury in the summer of 1996. In his testimony, Ramirez stated that while executing a warrant at Hamilton's residence, agents received a phone call from individuals who wanted to place illegal bets or wagers.

On August 2, 1996, Hamilton and his associates were indicted for conspiring to engage in illegal gambling activity, operating an illegal gambling business, and money laundering. Following a jury trial, Hamilton was acquitted of conspiracy but convicted on several counts of illegal gambling and money laundering. Punishment was assessed at 15 months confinement and a $7,500 fine. On appeal, the Fifth Circuit reversed both convictions, finding that the government had "no direct evidence supporting its contention that appellants engaged in illegal bookmaking

in Texas." *Truesdale,* 152 F.3d at 450. A judgment of acquittal was entered in favor on Hamilton upon remand to the district court.

Hamilton now sues Collett and Ramirez for civil rights violations under 42 U.S.C. § 1983 and its federal counterpart, *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). He accuses the defendants of false arrest and malicious prosecution in violation of the Fourth and Fourteenth Amendments to the United States Constitution. Collett and Ramirez filed a motion to dismiss the complaint for failure to state a claim and on grounds of qualified immunity. Their motions were denied on April 12, 2001. After the parties conducted limited discovery, Collett and Ramirez filed separate motions for summary judgment. The motions have been fully briefed and are ripe for determination.

II.

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Thurman v. Sears, Roebuck & Co.,* 952 F.2d 128, 131 (5th Cir.), *cert. denied,* 113 S.Ct. 136 (1992). A fact is "material" if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Matter of Gleasman,* 933 F.2d 1277, 1281 (5th Cir. 1991).

A movant who does not have the burden of proof at trial must point to the absence of a genuine fact issue. *Tubacex, Inc. v. M/V Risan,* 45 F.3d 951, 954 (5th Cir. 1995). The burden then shifts to the non-movant to show that summary judgment is not proper. *Duckett v. City of Cedar Park,* 950 F.2d 272, 276 (5th Cir. 1992). The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *Topalian v. Ehrman,* 954 F.2d 1125, 1131 (5th Cir.), *cert. denied,* 113 S.Ct. 82 (1992). All evidence must be viewed in the light most favorable to the party opposing the motion. *Rosado v. Deters,* 5 F.3d 119, 122 (5th Cir. 1993). However, conclusory statements, hearsay, and testimony based on conjecture or subjective belief are not competent summary judgment evidence. *Topalian,* 954 F.2d at 1131.

III.

Ramirez argues that Hamilton cannot maintain a civil rights action for false arrest and malicious prosecution because he was arrested pursuant to a valid warrant and prosecuted under an indictment returned by a federal grand jury. In addition, both Collett and Ramirez contend that Hamilton cannot prove the elements of his civil rights claims or overcome their qualified immunity defense. The court will address each argument in turn.

A.

Ramirez first maintains that Hamilton cannot establish lack of probable cause – an essential element of false arrest and malicious prosecution – because he was arrested pursuant to a valid warrant issued by an independent judicial officer and prosecuted under an indictment

returned by a federal grand jury. "It is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *Taylor v. Gregg,* 36 F.3d 453, 456 (5th Cir. 1994). The same rule applies to malicious prosecution actions where an indictment is returned by a grand jury. *See Rodriguez v. Ritchey,* 556 F.2d 1185, 1191 (5th Cir. 1977), *cert. denied,* 98 S.Ct. 894 (1978). However, this presupposes that the independent intermediary has been presented with all the facts and not been misled by law enforcement officials. "[A]ny misdirection of the magistrate or the grand jury by omission or commission perpetuates the taint of the original official behavior." *Hand v. Gary,* 838 F.2d 1420, 1426 (5th Cir. 1988).

The Ninth Circuit relied on *Hand* in addressing an argument similar to the one raised by Ramirez in this case. In *Harris v. Roderick,* 126 F.3d 1189 (9th Cir. 1997), *cert. denied,* 118 S.Ct. 1051 (1998), the plaintiff brought a *Bivens* action against various federal marshals for conspiracy to use excessive force in violation of his Fourth Amendment rights. The plaintiff was indicted and subsequently acquitted on charges of murder and assaulting federal officers during the infamous shoot-out at Ruby Ridge. In the civil case, plaintiff alleged that two of the marshals concocted a false story about what had happened in the gunfight in order to conceal their own wrongdoing and repeated these falsehoods in official documents and in their grand jury and trial testimony. The marshals moved to dismiss the *Bivens* action on the ground that the arrest warrant and grand jury indictment established probable cause for plaintiff's arrest and prosecution on criminal

charges. The district court rejected this argument and the Ninth Circuit affirmed. In its opinion, the appellate court noted:

> The argument here is, in essence, that if a conspiracy to lie is so successful that on the basis of the lies a grand jury finds probable cause, the conspirators become immunized for the constitutional injury they have caused. We disagree. In *Hand v. Gary,* the Fifth Circuit examined the question whether state actors could assert immunity from liability for malicious prosecution simply because an indictment was obtained, regardless of the circumstances surrounding its return. The *Hand* court concluded that a finding of probable cause that is "tainted by the malicious actions of the government officials involved" does not preclude a claim against the officials involved. We adopt the *Hand* reasoning.

Id. at 1198. *See also White v. Frank,* 855 F.2d 956, 961-62 (2d Cir. 1988) (holding that presumption of probable cause from an indictment may be overcome by evidence that the indictment was the product of fraud or perjury).

Here, Hamilton has presented some evidence that Collett and Ramirez made false statements to judicial officers and grand jurors concerning his involvement in illegal gambling activities. This breaks the chain of causation and may subject the defendants to civil liability. Accordingly, Ramirez is not entitled to summary judgment on this ground.

B.

Collett and Ramirez further argue that there are no genuine issues of material fact with respect to Hamilton's false arrest and malicious prosecution claims.

1.

In order to establish a constitutional claim of false arrest, Hamilton must prove that Collett and Ramirez knowingly provided false information to secure an arrest warrant or provided false information in reckless disregard of the truth. *Freeman v. County of Bexar,* 210 F.3d 550, 553 (5th Cir.), *cert. denied,* 121 S.Ct. 318 (2000), *citing Franks v. Delaware,* 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978). The court then must determine whether the warrant would establish probable cause without the allegedly false information. *Id.; see also Burge v. Parish of St. Tammany,* 187 F.3d 452, 481 (5th Cir. 1999).

Lack of probable cause is also an essential element of malicious prosecution. *Goodson v. City of Corpus Christi,* 202 F.3d 730, 740 (5th Cir. 2000); *Pete v. Metcalfe,* 8 F.3d 214, 219 (5th Cir. 1993). In determining whether probable cause exists, the critical inquiry is whether defendants were confronted "with existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts and the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Gordy v. Burns,* ___ F.3d ___, 2002 WL 1310375 at *4 (5th Cir. Jun. 17, 2002), q[illegible]*ting Kerr v. Lyford,* 171 F.3d 330, 340 (5th Cir. 1999). *See also Piazza v. Mayne,* 217 F.3d 239, 246 (5th Cir. 2000) (probable cause in malicious prosecution case requires basis for officer to

believe to a "fair probability" that crime has been committed).

2.

Hamilton was arrested and indicted on both state and federal gambling charges, but prosecuted only on the federal charge. The state indictment charged Hamilton with operating an "illegal bookmaking" operation. (Ramirez App. at 95). Under Texas law, "bookmaking" is defined as:

> (1) to receive and record or to forward more than five bets or offers to bet in a period of 24 hours;
>
> (2) to receive and record or to forward bets totaling more than $1000 in a period of 24 hours; or
>
> (3) a scheme by three or more persons to receive, record, or forward offers to bet.

TEX. PENAL CODE. ANN. § 47.01(2)(A)-(C) (Vernon 1989). The state indictment was dismissed after federal authorities expressed their intent to prosecute Hamilton on related charges. (Ramirez App. at 96; Collett App. at 14). Thereafter, Hamilton was indicted by a federal grand jury for conspiring to engage in illegal gambling activity, operating an illegal gambling business, and money laundering. (Hamilton App. at 131-44). Federal law defines an "illegal gambling business" as a gambling business which:

> (1) is a violation of the law of the State or political subdivision in which it is conducted;

> (2) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (3) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

18 U.S.C. § 1955(a); *see also United States v. Heacock,* 31 F.3d 249, 252 (5th Cir. 1994). The federal money laundering statute prohibits any financial transaction involving the proceeds of unlawful activity in order to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i). As the Fifth Circuit recognized in *Truesdale,* an essential element of both the federal gambling and money laundering charges is that Hamilton "engaged in illegal bookmaking *in Texas.*" *Truesdale,* 152 F.3d at 448 (emphasis added). The appellate court ultimately concluded that no such evidence was presented in the criminal trial. Thus, in order to subject Collett and Ramirez to civil liability for initiating his arrest and prosecution, Hamilton must show that these defendants fabricated evidence or knowingly misled the prosecuting authorities as to the nature and extent of his gambling activities in Texas.

The record is replete with such evidence. In his affidavit in support of the state search warrant, Collett stated that he placed over 200 wagers with World Sports-Book and that "Hamilton and the listed accomplices were operating the illegal sports bookmaking operation from Dallas, Texas." (Ramirez App. at 92; Collett App. at 11). While executing the warrant at Hamilton's residence, Collett said that "bets were taken over his telephone from

players who could not get through on the regular betting lines . . . " (Hamilton App. at 147). Ramirez gave similar testimony before a federal grand jury. (Ramirez App. at 105; Collett App. at 22). However, other evidence in the record suggests that the agents knew that Hamilton never conducted any illegal gambling activities in Texas. (Hamilton App. at 178-83, 207-08). In his deposition, Collett was asked:

> Q: [W]here was the place where the bookmaking bets were being accepted?
>
> A: Till I actually sent off or called the toll free number that was on there or wherever I got the toll free number and talked to the people, I didn't know where it was at. I talked to someone on the phone when I called the number, and they advised that it was – they was located – they moved twice during the investigation. They were located someplace in the islands. I can't recall where it was.
>
> Q: Was it Jamaica or the Dominican Republic or both of them?
>
> A: I think that probably during the investigation it was probably both. I can't recall exactly where it was at, you know, like I stated.

(Ramirez App. at 6). Although Collett went on to explain that he believed Hamilton was running the bookmaking operation from his home, he based this testimony on the assumption that the 800 numbers he called to place bets in an undercover capacity terminated in Texas. (*Id.* at 8-9). When pressed, Collett finally admitted that he "didn't know exactly where the bets were being taken." (*Id.* at 9). This belated concession is inconsistent with Collett's prior statements and grand jury testimony.

Moreover, there is compelling evidence that no bets were taken by agents while executing the search warrant at Hamilton's residence. Roberto Molina, the FBI agent who allegedly accepted this bet over the telephone, was asked at his deposition:

> Q: Did you ever at any time tell anybody there was a bet?
>
> A: No, I'd never told anyone that there was actually – a bet had taken place.
>
> Q: All right. Did you ever tell Ramirez that there was a bet?
>
> A: That a bet had taken place? No.
>
> Q: Did you discuss the contents of Exhibit 8A with Mr. Ramirez?[2]

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[2] Exhibit 8A is an FBI 302 Statement by Molina describing the contents of a telephone call he answered at Hamilton's residence while executing the search warrant. According to Molina:

> On June 18, 1993, while conducting a search of a residence located at 9719 Van Dyke, Dallas, Texas, Special Agent ROBERTO MOLINA of the Dallas Federal Bureau of Investigation (FBI), answered an in coming phone call at approximately 6:05 pm from an individual named HARRY BAUT. BAUT requested to know "what's the line". BAUT was asked which team he wanted the line on. BAUT said Houston. BAUT was told that the line was Houston by two. BAUT stated that he did not believe that the line was Houston by two and asked if he had the right phone number. BAUT was told that he did have the right phone number and asked if he wanted to place a bet. BAUT stated that he did want to place a bet, but he wanted to know what the line was. BAUT was told that we were very busy at the time and someone would return his call. BAUT agreed and gave his phone number as (717) 735-8855. BAUT also gave his account

(Continued on following page)

A: Yes, I did. As a matter of fact, from my best recollection, he was standing in the room when the phone call took place.

Q: So you discussed it with him right afterwards.

A: Yes.

Q: Did you tell him right afterwards, "I just made a bet"?

A: No, I did not.

Q: *So it's clear in your mind that it would not have been possible for Mr. Ramirez to walk away from reading the 302 or walk away from what took place on June 18th, '93, in Mr. Hamilton's home after you spoke with Mr. Baut – for him to walk away with the belief that a bet had taken place; is that fair?*

A: *That is fair.*

(*Id.* at 90) (emphasis added).

The court finds that this evidence, viewed in the light most favorable to plaintiff, creates a genuine issue of material fact as to whether Collett and Ramirez had reason to believe to a "fair probability" that Hamilton was conducting an illegal gambling operation in Texas. *Piazza,* 217 F.3d at 246. This fact was critical to establishing probable cause for obtaining a search warrant and prosecuting

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number as 5005. No further attempts were made to contact BAUT.

(Hamilton App. at 153).

Hamilton for violating 18 U.S.C. § 1955(a). Consequently, summary judgment is not proper on this ground.

3.

In a related argument, Ramirez contends that Hamilton is precluded from asserting a false arrest or malicious prosecution claim because the district court denied his request for attorney's fees under the Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997), *reprinted in* 18 U.S.C. app. § 3006A. *See United States v. Truesdale,* No. 3-96-CR-261-D (N.D. Tex. Dec. 22, 1998), *aff'd,* 211 F.3d 898 (5th Cir. 2000). The court rejects this argument for three reasons. First, to the extent that Ramirez relies on the doctrine of collateral estoppel, he has not raised this affirmative defense in his answer. FED. R. CIV. P. 8(c); *Mozingo v. Correct Manufacturing Corp.*, 752 F.2d 168, 172 (5th Cir. 1985) (collateral estoppel is affirmative defense which, if not pled, is considered waived). Second, Hamilton points out that he was unaware of certain crucial evidence at the time he filed his request for attorney's fees in the criminal case. In particular, Hamilton did not know that Ramirez had falsely testified before the grand jury that an agent accepted a bet while executing a search warrant at Hamilton's residence. (Hamilton App. at 186; Ramirez App. at 105). Third, the elements of a claim for attorney's fees under the Hyde Amendment and a cause of action for false arrest or malicious prosecution are different. The Hyde Amendment authorizes the district court to award reasonable attorney's fees and litigation expenses to a prevailing defendant in a criminal case upon proof that "the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make

such an award unjust." 18 U.S.C. app. § 3006A. Although Ramirez suggests that these standards are equivalent to a finding of probable cause, he cites no authority to support such an argument. The court declines to grant summary judgment on this basis.

C.

Finally, Collett and Ramirez argue that there is no evidence their conduct violated a clearly established constitutional right or that their actions were objectively unreasonable. As a result, both defendants seek summary judgment on the grounds of qualified immunity.

1.

Law enforcement officials are immune from suit for discretionary acts performed in good faith while acting within the scope of their authority unless their conduct violates a "clearly established statutory or constitutional right of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The Supreme Court has clarified the analytical structure under which a claim of qualified immunity should be addressed. *See Siegert v. Gilley,* 500 U.S. 226, 231-33, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). First, the court must determine "whether the plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer,* ___ U.S. ___, 122 S.Ct. 2508, 2514, ___ L.Ed.2d ___ (2002); *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001); *Siegert,* 111 S.Ct. at 1793. If the plaintiff sufficiently alleges the violation of a constitutional right, the court must decide whether that right was clearly established at the

time of the alleged violation and whether the conduct of the officer was objectively unreasonable under the circumstances. *Siegert,* 111 S.Ct. at 1789.

A constitutional right is clearly established if "the contours of that right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope,* 122 S.Ct. at 2515, *quoting Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). While this does not require proof that the specific conduct in question has previously been held unlawful in "fundamentally similar" or "materially similar" cases, officials are still entitled to "fair warning" that their conduct violates a constitutional right. *Id.* at 2515-16, *citing United States v. Lanier,* 520 U.S. 259, 269, 117 S.Ct. 1219, 1226-27, 137 L.Ed.2d 432 (1997). Thus, the salient question is whether the state of the law at the time gives officials "fair warning" that their conduct is unconstitutional. *Id.*

2.

The court has determined that Hamilton has sufficiently stated a claim against Collett and Ramirez for violating his rights under Fourth and Fourteenth Amendments by providing false and misleading information which resulted in his arrest and prosecution on federal gambling charges. At the time this investigation began in 1992, the prohibition against using false evidence to obtain a criminal conviction was clearly established by the Supreme Court. *Pyle v. State of Kansas,* 317 U.S. 213, 216, 63 S.Ct. 177, 178-79, 87 L.Ed.2d 214 (1942). *See also Young v. Biggers,* 938 F.2d 565, 570 n. 9 (5th Cir. 1991) (fabrication of evidence against innocent defendant violates clearly

established constitutional right); *Kerr,* 171 F.3d at 339 (constitutional right to be free from malicious prosecution established since at least 1990); *Duckett,* 950 F.2d at 278 (clearly established right to be free from illegal arrest); *Reyes v. Sazan,* ___ F.Supp.2d ___, 2002 WL 987385 at *2 (E.D. La. May 10, 2002), *citing Devereaux v. Abbey,* 263 F.3d 1070, 1075 (9th Cir. 2001) (fabrication of evidence to support probable cause determination violates clearly established federal law). Thus, Collett and Ramirez had "fair warning" that the conduct alleged by Hamilton was unlawful.

Although both defendants argue that their actions were objectively reasonable under the circumstances, there are simply too many disputed facts regarding their knowledge of Hamilton's bookmaking activities in Texas to permit this case to be disposed of on summary judgment. This is not to say that Collett and Ramirez are not entitled to qualified immunity as a matter of substantive law. Rather, the issue will have to be resolved at trial. *Garris v. Rowland,* 678 F.2d 1264, 1270 (5th Cir.), *cert. denied,* 103 S.Ct. 143 (1982) (jury must resolve controverted facts relied on to show probable cause before controlling legal principles are applied). *See also Enlow v. Tishomingo County, Mississippi,* 962 F.2d 501, 510 (5th Cir. 1992) (same).

RECOMMENDATION

The summary judgment motions filed by Defendants J.D. Collett and Jeffrey Ramirez should be denied in their entirety.

DATED: July 22, 2002.

/s/ Jeff Kaplan
JEFF KAPLAN
UNITED STATES MAGISTRATE
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD A. HAMILTON	§	
Plaintiff,	§	
	§	
VS.	§	NO. 3-00-CV-1469-R
J.D. COLLETT, ET AL.	§	
	§	
Defendants.	§	

ORDER

(Filed Aug. 8, 2002)

After making an independent review of the pleadings, files and records in this case, and the Findings and Recommendation of the United States Magistrate Judge, I am of the opinion that the Findings and Recommendation of the Magistrate Judge are correct and they are hereby adopted as the Findings of the Court.

SIGNED this 6 day of August, 2002.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD A. HAMILTON Plaintiff,	§ § §	
VS.	§	NO. 3-00-CV-1469-R
J.D. COLLETT, ET AL. Defendants.	§ § §	

JUDGMENT

(Filed Aug. 8, 2002)

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

1. The summary judgment motions filed by Defendants J.D. Collett and Jeffrey Ramirez should be denied in their entirety.

2. The Clerk shall transmit a true copy of this Order and the Order adopting the Findings and Recommendation of the United States Magistrate Judge to all parties.

SIGNED this 6 day of August, 2002.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10954

RONALD A HAMILTON

Plaintiff-Appellee

v.

J D COLLETT; ET AL

Defendants

J D COLLETT; JEFFREY RAMIREZ

Defendants-Appellants

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

(Filed Jan. 12, 2004)

Before GARWOOD, JONES, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Edith H. James
United States Circuit Judge